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Criminal Law—Hypnotically-Induced Testimony Held Inadmissable in Criminal Proceeding—State v. Mack, 292 N.W.2d 764 (Minn. 1980)

arguably privileged material,[56] state legislatures may be spurred into clarifying the presently uncertain boundaries of third-party searches under state law.

Criminal Law—HYPNOTICALLY-INDUCED TESTIMONY HELD INADMISSIBLE IN CRIMINAL PROCEEDING—*State v. Mack*, 292 N.W.2d 764 (Minn. 1980).

The admissibility of hypnotically-induced testimony was first confronted by the American judicial system in *People v. Ebanks*,[1] an 1897 California case.[2] The *Ebanks* court held that exculpatory statements made by defendant while under hypnosis were inadmissible, indicating that hypnosis could not be used to establish a defense to a crime.[3] Following *Ebanks* and its progeny the issue of hypnotically-induced testimony generally was dormant within the courts[4] until the 1950 North

56. While title I of the Act applies to both federal and state officials, title II, which deals with third parties that are not associated with the dissemination of information to the public, applies only to federal employees. *See* Privacy Protection Act of 1980, Pub. L. No. 96-440, tit. II, § 201, 49 U.S.L.W. 185, 186 (Dec. 9, 1980).

1. 117 Cal. 652, 49 P. 1049 (1897). In *Ebanks*, the defendant sought to call an expert witness to the stand to testify that the defendant was not guilty based on statements made to the hypnotist while the defendant was in a hypnotic trance. *See id.* at 665, 49 P. at 1053. In an earlier case, the California Supreme Court was presented with the defense of hypnotic suggestion but the court did not discuss the legal admissibility of the defense. *See* People v. Worthington, 105 Cal. 166, 38 P. 689 (1894).

2. *See* Note, *Hypnotism and the Law*, 14 VAND. L. REV. 1509, 1519 (1961) (question of whether statements made during hypnosis could be admitted as evidence was first before American courts in 1897 case of *People v. Ebanks*).

In the late 1800's, two European cases were recorded in which hypnotists were charged with "seduction abetted by hypnosis" and a third case involved not only the defense that the crime of murder had been induced by hypnosis but also the use of hypnosis as an investigative tool. *See* Herman, *The Use Of Hypno-Induced Statements In Criminal Cases*, 25 OHIO ST. L.J. 1, 1-2 (1964). These European cases sparked an immediate interest by the American criminal bar and led to attempts by defense lawyers to use hypnosis to acquit their clients. *See id.* at 2. There were a number of early cases involving either the defense of hypnotic suggestion or the admissibility of statements under hypnosis. *See, e.g.*, People v. Ebanks, 117 Cal. 652, 665, 49 P. 1049, 1053 (1897); People v. Worthington, 105 Cal. 166, 172, 38 P. 689, 691 (1894); Austin v. Barker, 110 A.D. 510, 512-17, 96 N.Y.S. 814, 815-19 (1906). These early cases tended to involve sexual crimes perpetrated against hypnotized persons. *See* Ladd, *Legal Aspects of Hypnotism*, 11 YALE L.J. 173, 178 (1902).

3. *See* 117 Cal. at 665, 49 P. at 1053. The California Supreme Court examined the trial court's finding that "[t]he law of the United States does not recognize hypnotism" and that, consequently, the offer by defendant of testimony elicited from him while under hypnosis "would be an illegal defense." *Id.* The supreme court concluded: "We shall not stop to argue the point, and only add the court was right." *Id.*

4. *See* Herman, *supra* note 2, at 2. "[F]rom 1894 to 1915, there were a number of cases involving . . . the admissibility of exculpatory statements made under hypnosis. . . . However, judicial hostility was manifest. . . . [F]rom 1915 until 1950, there was

Dakota case of *State v. Pusch*,[5] which heralded a renewed interest by litigants and commentators in the legal aspects of hypnotically-induced testimony.[6] *Pusch* also held that hypnotically-induced testimony could not be used to establish a criminal defense.[7] It was not until 1980, however, that the Minnesota Supreme Court, in *State v. Mack*,[8] addressed the admissibility of hypnotically-induced testimony. The *Mack* court held that such testimony was inadmissible in a criminal proceeding because the science of hypnosis had not achieved sufficient acceptance in the scientific community.[9] The decision, however, did not foreclose the use of

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but one reported case dealing with any medico-legal aspect of hypnosis." *Id.* (referring to Louis v. State, 24 Ala. 120, 130 So. 904 (1930)) (footnotes omitted).

In Louis v. State, 24 Ala. 120, 130 So. 904 (1930), the defendant was convicted of robbery and had allegedly procured money from the victim through hypnosis. *See id.* at 124-25, 130 So. at 904-05. Under Alabama law, any conviction of robbery must be supported by a finding that the defendant had taken property from the victim either by violence to her person or by putting her in fear. *See id.* The Alabama Court of Appeals found that the record disclosed no violence to the victim's person. Furthermore, the court held that fear was not an element of hypnosis. *See id.* at 125, 130 So. at 905. Because neither of these prerequisites were established by the record, the court overturned the conviction. *See id.*

5. 77 N.D. 860, 46 N.W.2d 508 (1950).

6. Following *Pusch*, a number of cases in other jurisdictions and a number of commentators examined the issue of hypnotically-induced testimony. *See, e.g.*, People v. Modesto, 59 Cal. 2d 722, 732-33, 382 P.2d 33, 39-40, 31 Cal. Rptr. 225, 231-32 (1963) (admission of hypnotically-induced testimony within discretion of court, but court erred in failing to exercise discretion), *overruled in part on other grounds*, People v. Morse, 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964); People v. Busch, 56 Cal. 2d 868, 878, 366 P.2d 314, 319, 16 Cal. Rptr. 898, 903-04 (1961) (court did not abuse discretion by disallowing hypnotically-induced testimony where reliability of hypnosis and qualification of expert not established); People v. Marsh, 170 Cal. App. 2d 284, 287-88, 338 P.2d 495, 497-98 (1959) (court did not err by permitting expert testimony on effects of hypnosis while disallowing courtroom demonstration of hypnosis); People v. Leyra, 302 N.Y. 353, 361-62, 98 N.E.2d 553, 557-58 (1951) (issue of involuntary confession because of hypnotic influence is one of fact within province of jury), *cert. denied*, 345 U.S. 918 (1953); State v. Harris, 241 Or. 224, 236-42, 405 P.2d 492, 497-500 (1965) (court properly excluded hypnotically-induced, tape-recorded testimony); Levy, *Hypnosis and Legal Immutability*, 46 J. CRIM. L.C. & P.S. 333 (1955); Comment, *Hypno-Induced Statements: Safeguards for Admissibility*, 1970 LAW & SOC. ORD. 99; Note, *Hypnotism, Suggestibility and the Law*, 31 NEB. L. REV. 575 (1952); Note, *supra* note 2; 11 HASTINGS L.J. 72 (1959); note 19 *infra* and accompanying text.

7. *See* State v. Pusch, 77 N.D. 860, 886-88, 46 N.W.2d 508, 521-22 (1950). In *Pusch*, the defendant was put into a hypnotic trance on several occasions by a trained hypnotist. The hypnotist was not permitted to testify about the exculpatory statements made by the defendant or about other statements made by the defendant that tended to show his innocence. *See id.* at 886-88, 46 N.W.2d at 521-22.

The *Pusch* court was unaware of *Ebanks* when it rendered its decision. In concluding that the hypnotically-induced testimony was inadmissible, the court found that "[n]o case has been cited by either party relating to the admissibility of the evidence profferred and no case has been found." *See id.* at 886, 46 N.W.2d at 522.

8. 292 N.W.2d 764 (Minn. 1980).

9. *See* 292 N.W.2d at 768. For a discussion of the reasoning of the court's decision, see notes 39-49 *infra* and accompanying text. Arizona also precluded the use of hypnoti-

hypnosis as an investigative tool.[10]

In *Mack*, hypnosis was used by the Minneapolis police to aid the complainant in remembering the circumstances surrounding a serious injury that occurred while she was heavily intoxicated.[11] Under hypnosis,[12] the

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cally-induced testimony near the time of the *Mack* decision. *See* State v. La Mountain, 125 Ariz. 547, 551, 611 P.2d 551, 555 (1980).

While authorities vary on the precise definition of the hypnotic state, the American Medical Association has defined hypnosis as a "temporary condition of altered attention in the subject which may be induced by another person and in which a variety of phenomena may appear spontaneously or in response to verbal or other stimuli, these phenomena include alterations in consciousness and memory and increased susceptibility to suggestion . . . ." Council on Mental Health, *Medical Use of Hypnosis*, 168 J.A.M.A. 186, 188 (1958); *accord*, 9 ENCYCLOPEDIA BRITANNICA MACROPAEDIA 133 (1974) (hypnosis defined as "a sleeplike state that nevertheless permits a wide range of behavioral responses to stimulation"). The Encyclopedia article on hypnosis was written by Dr. Orne, who was one of the experts in the *Mack* case. *See* 292 N.W.2d at 766. The *Mack* court recognized that hypnosis has been "defined as a 'highly suggestible state into which a willing subject is induced by a skilled therapist' . . . ." *See id.* at 765 (footnote omitted).

In a recent criminal case, the Minnesota court was faced with an issue similar to the hypnosis issue in *Mack*. *See* State v. Posten, No. 50328 (Minn.), Finance and Commerce, Jan. 30, 1981, at 6. In *Posten*, the court ruled that it was not improper to admit testimony regarding the complainant's "sleep talk." *Id.* at 7. The defendant was suspected of sexually molesting the complainant. After the alleged molestations were discovered, the complainant was placed in a foster home. While there she had several bad dreams in which she uttered the defendant's name and said "stop it, stop it." *Id.* at 6. The court noted that this testimony was just one element of the evidence of the defendant's guilt. *See id.* at 7. "[T]he error, if any, was harmless." *Id.*

In a concurring opinion, Justice Wahl, the author of the *Mack* decision, concluded that such evidence was inadmissible. *See id.* (Wahl, J., concurring specially). Justice Wahl indicated that such evidence is inherently unreliable "because its probative value is more than substantially outweighed by the dangers of prejudice. . . . The same concern about the unreliability of the evidence which led this court to rule inadmissible statements made in a pre-trial interview should be controlling in this case." *Id.* at 7-8 (Wahl, J., concurring specially) (citing State v. Mack, 292 N.W.2d 764 (Minn. 1980)).

10. *See* 292 N.W.2d at 771. For a further discussion of the investigatory use of hypnosis, see notes 57-63 *infra* and accompanying text.

11. *See* 292 N.W.2d at 766-67. Conflicting and incomplete explanations were given for the complainant's injury, which consisted of "a cut through the vaginal tissue." *See id.* at 766. According to defendant, he and complainant "were engaged in sexual intercourse when she started bleeding." The complainant initially believed that she had been injured in a motorcycle accident. After being advised by her doctors that her injuries could not have occurred in the ways described, the complainant contacted the police to report an assault. She informed the police that she was unable to remember anything about the cause of her injury. Furthermore, the complainant indicated that she had recently suffered emotional problems because of the termination of a serious relationship with a man and that "she had 'blacked out' from drinking on other occasions." To help the complainant recall the events surrounding her injury, the police contacted a "self-taught lay hypnotist," Mr. Beauford Kleidon. *See id.*

One court has held that hypnosis of a witness conducted by law enforcement personnel constitutes an identification proceeding. People v. Hughes, 99 Misc. 2d 863, 871-72, 417 N.Y.S.2d 643, 649 (County Ct. 1979). The *Hughes* court held that a defendant is entitled to a pretrial hearing to determine whether the procedures used were so impermis-

complainant recalled being sexually assaulted with a switchblade.[13] At the close of the hypnotic session, she was told to remember everything that occurred on the night of the assault.[14] After the hypnotic session,

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sibly suggestive that they would give rise to the substantial likelihood of uncorrectable misidentification. *See id.* at 872, 417 N.Y.S.2d at 649. The *Hughes* court held, however, that the defendant did not have a sixth amendment right to have his counsel present at the hypnotic sessions. *See id.*

12. Mr. Kleidon, the complainant's hypnotist, stated that before the hypnotic session he was aware only that the witness had a memory block regarding the cause of her injury. *See* 292 N.W.2d at 767. Two police officers accompanied the complainant to Mr. Kleidon's office and left for 45 minutes so that Mr. Kleidon could conduct tests and hypnotize the complainant. *See id.*

> During this time, Kleidon tested . . . [the complainant's] hypnotic susceptibility with several standard tests, induced hypnosis with a standard fixation procedure, and, when he had determined that she had entered a deep hypnotic state, asked her permission for [the officers] to enter the room. . . . [The complainant] agreed, and the policemen entered and made an audio tape recording of the portion of the hypnotic session which followed. This tape itself has been lost. A transcript, typed by the police stenographer, was received in evidence as State's Exhibit C.

Id.

13. *See id.* During hypnosis, Mr. Kleidon instructed the complainant to "remember the events of May 13 and May 14 as they actually occurred, but as though on a television screen and without emotion." *See id.* Under this hypnotic trance, the complainant recalled the incident. *See id.*

14. At the close of the session, but while the complainant was still in a hypnotic trance, Mr. Kleidon gave the complainant the following "post-hypnotic suggestion": " 'You are going to feel as if your body and mind have been completely rejuvenized [sic] and you will be able to remember very clearly everything that has happened on the 13th and 14th. Now that memory is very clear in your mind. This does not disturb you.' " *See id.* ([sic] in original).

The court believed that a "post-hypnotic suggestion" raised serious constitutional problems because the ability of the defendant's attorney to effectively cross-examine the witness would be impaired. *See id.* at 768-70. The court observed that:

> A witness who was unclear about his "story" before the hypnotic session becomes convinced of the absolute truth of the account he made while under hypnosis. This conviction is so firm that the ordinary "indicia of reliability" are completely erased, and hypnotic subjects have been able to pass lie detector tests while attesting to the truth of statements they made under hypnosis which researchers know to be utterly false. It would be impossible to cross-examine such a witness in any meaningful way. Such firm subjective conviction as could easily fool a juror is even more likely to result from a situation where the subject has been given a post-hypnotic suggestion like the one in this case . . . .

Id. at 769 (footnotes omitted).

The Ninth Circuit Court of Appeals took a different view of the admissibility of testimony based on memory refreshed by hypnosis. In United States v. Adams, 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978) the court stated:

> [The defendant] did not object to the adequacy of the foundation laid for the receipt of the testimony. Rather, he attempted to exclude all in-court testimony of [the previously hypnotized witness] on the grounds that no testimony from witnesses who had been hypnotized could be reliable, and that the use of testimony of a witness who had been hypnotized would deny the defendant his Sixth Amendment right to confrontation and his right to call witnesses on his own behalf. The predicate for both constitutional arguments is that the in-court testimony of a witness who had earlier been subject to hypnosis is unreliable as a

the complainant gave the Minneapolis Police Department a "typewritten statement recounting as her present memory the events of May 13, as she reported them under hypnosis."[15] Based on this statement, a complaint was issued charging the defendant with criminal sexual conduct in the first degree and aggravated assault with a dangerous weapon.[16]

Prior to a hearing on probable cause, the district court certified to the Minnesota Supreme Court the question of whether a previously hypnotized witness may testify in a criminal proceeding concerning the subject matter adduced at a pretrial hypnotic interview.[17]

Since the *Pusch* and *Ebank* decisions, hypnosis has achieved recognition in the medical community as a legitimate method of treatment.[18] The medical acceptance of hypnosis may have spurred the recent interest in

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matter of law rendering the witness legally incompetent to testify. We rejected that premise in *Kline v. Ford Motor Company, Inc.*, [523 F.2d 1067, 1069 (9th Cir. 1975) (per curiam)] and we see no reason for a different result in the context of a criminal case.

581 F.2d at 199.

The Minnesota Supreme Court, in refusing to admit hypnotically-induced testimony, relied upon the results of lie detector tests. Specifically, the *Mack* court found persuasive the ability of hypnotized subjects to pass such tests while clearly attesting to falsehoods. *See* 292 N.W.2d at 769. The same court, however, held the results of a lie detector test to be inadmissible as scientifically unreliable. *See, e.g.*, State v. Wakefield, 263 N.W.2d 76, 77 (Minn. 1978), *noted in* 6 WM. MITCHELL L. REV. 455 (1980); State v. Hill, 312 Minn. 514, 525, 253 N.W.2d 378, 385 (1977) (per curiam); State v. Goblirsch, 309 Minn. 401, 407, 246 N.W.2d 12, 15 (1976).

15. *See* 292 N.W.2d at 767.

16. *See* Respondent's Brief at 13. The statute, under which the defendant was charged with first degree criminal sexual conduct, states:

> A person is guilty of criminal sexual conduct in the first degree and may be sentenced to imprisonment for not more than 20 years, if he engages in sexual penetration with another person and if any of the following circumstances exists: . . . [t]he actor causes personal injury to the complainant, and . . . [t]he actor uses force or coercion to accomplish sexual penetration . . . .

See MINN. STAT. § 609.342(e) (1980).

The statute under which defendant was charged with aggravated assault, stated: "Whoever assaults another with a dangerous weapon but without inflicting great bodily harm may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $5,000, or both." Act of May 17, 1963, ch. 753, art. I, § 609.225(2), 1963 Minn. Laws 1185, 1202, *as amended by* Act of May 24, 1969, ch. 738, § 1, 1969 Minn. Laws 1336 (repealed 1979).

17. 292 N.W.2d at 765. The Minnesota Rules of Criminal Procedure provide that a judge may certify a case to the Minnesota Supreme Court if, in the opinion of the judge, it presents a question of such important or doubtful character that it requires a decision by the supreme court. *See* MINN. R. CRIM. P. 29.02(4).

18. *See* Council on Mental Health, *Medical Use of Hypnosis*, 168 J.A.M.A. 186, 187 (1958) (after extensive two-year study, American Medical Association endorsed use of hypnosis); *accord*, People v. Smrekar, 68 Ill. App. 3d 379, 385-86, 385 N.E.2d 848, 853 (1979) (stating that medical authorities indicate hypnosis is valuable tool which can be used to restore memory); Spector & Foster, *Admissability of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567, 568 (1977) (courts cannot retreat from increased recognition and understanding hypnosis has received in medical community).

seeking the admission of hypnotically-induced testimony in a court proceeding.[19] The result has been a less than uniform treatment of hypnotically-induced testimony.[20]

The question of the admissibility of hypnotically-induced testimony in a criminal proceeding generally arises in two contexts.[21] The first involves the use of hypnosis by a defendant seeking to prove his innocence,[22] and the second concerns the prosecution's use of hypnosis to revive the memory of a witness or victim.[23] Generally, courts have held that a defendant's exculpatory statements made while under hypnosis are inadmissible.[24] Courts, however, generally have admitted hypnoti-

19. *See, e.g.*, United States v. Adams, 581 F.2d 193, 198-99 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); United States v. Narciso, 446 F. Supp. 252, 281 (E.D. Mich. 1977); People v. Smrekar, 68 Ill. App. 3d 379, 384-88, 385 N.E.2d 848, 852-55 (1979); Harding v. State, 5 Md. App. 230, 235-47, 246 A.2d 302, 306-12 (1968), *cert. denied*, 395 U.S. 949 (1969); State v. McQueen, 295 N.C. 96, 119-22, 244 S.E.2d 414, 427-29 (1978); note 6 *supra* and accompanying text.

20. *See* notes 21-38 *infra* and accompanying text.

21. *See* notes 22-23 *infra* and accompanying text.

22. *See, e.g.*, Greenfield v. Robinson, 413 F. Supp. 1113, 1120-21 (W.D. Va. 1976); People v. Busch, 56 Cal. 2d 868, 875-78, 366 P.2d 314, 318-20, 16 Cal. Rptr. 898, 902-04 (1961); Rodriguez v. State, 327 So. 2d 903, 904 (Fla. Dist. Ct. App.), *cert. denied*, 336 So. 2d 1184 (Fla. 1976); People v. Hangsleben, 86 Mich. App. 718, 727-31, 273 N.W.2d 539, 543-45 (1978); Jones v. State, 542 P.2d 1316, 1326-27 (Okla. Crim. App. 1975); State v. Pierce, 263 S.C. 23, 30, 207 S.E.2d 414, 418 (1974); Greenfield v. Commonwealth, 214 Va. 710, 715-16, 204 S.E.2d 414, 418-19 (1974).

23. *See, e.g.*, United States v. Adams, 581 F.2d 193, 198-99 (9th Cir.) (witness to robbery and murder allowed to testify after memory refreshed by hypnosis), *cert. denied*, 439 U.S. 1006 (1978); United States v. Narciso, 446 F. Supp. 252, 280-82 (E.D. Mich. 1977) (witness allowed to testify after hypnotized by FBI during investigation of crime); State v. La Mountain, 125 Ariz. 547, 551, 611 P.2d 551, 555 (1980) (testimony of witness whose memory was refreshed through hypnosis not admissible); Creamer v. State, 232 Ga. 136, 137-38, 205 S.E.2d 240, 241-42 (1974) (testimony of witness hypnotized during criminal investigation not tainted by hypnosis, testimony admissible); Emmett v. State, 232 Ga. 110, 114-15, 205 S.E.2d 231, 234-35 (1974) (defendant not prejudiced by trial court's refusal to allow cross-examination of state's witness concerning statements made while witness in hypnotic trance); People v. Smrekar, 68 Ill. App. 3d 379, 384-88, 385 N.E.2d 848, 852-55 (1979) (testimony of prosecution witness not rendered inadmissible because hypnotized prior to making a positive identification); Harding v. State, 5 Md. App. 230, 235-47, 246 A.2d 302, 306-12 (1968) (testimony of witness whose recollection of crime restored by hypnosis held admissible), *cert. denied*, 395 U.S. 949 (1969); State v. McQueen, 295 N.C. 96, 119-22, 244 S.E.2d 414, 427-29 (1978) (effect of hypnosis on witness' credibility was for jury to determine); State v. Brom, 8 Or. App. 598, 602, 494 P.2d 434, 436 (1972) (prosecution witness allowed to testify after her memory had been refreshed by sodium amytal and hypnosis); State v. Jorgensen, 8 Or. App. 1, 8-9, 492 P.2d 312, 315 (1971) (witness allowed to testify after amnesia was alleviated by hypnosis).

24. *See, e.g.*, Greenfield v. Robinson, 413 F. Supp. 1113, 1120-21 (W.D. Va. 1976) (upheld refusal to allow defendant to testify about defendant's statements under hypnosis); People v. Busch, 56 Cal. 2d 868, 875-78, 355 P.2d 314, 318-20, 15 Cal. Rptr. 898, 902-04 (1961) (doctor's testimony regarding defendant's statements under hypnosis excluded because reliability of hypnosis not established); Rodriguez v. State, 327 So. 2d 903, 904 (Fla. Dist. Ct. App.) (defendant's exculpatory statements made while hypnotized properly

cally-induced testimony of prosecution witnesses, but often with the requirement that the facts adduced while under hypnosis be corroborated.[25]

Several of the jurisdictions admitting hypnotically-induced testimony have expressed reservations about the use of hypnosis.[26] The Ninth Circuit Court of Appeals, in *United States v. Adams*,[27] expressed the concern "that the investigatory use of hypnosis on persons who may later be

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excluded because no evidence of scientific reliability of hypnosis), *cert. denied*, 336 So. 2d 1184 (Fla. 1976); People v. Hangsleben, 86 Mich. App. 718, 727-31, 273 N.W.2d 539, 543-45 (1978) (hypnotically-induced testimony of defendant disallowed because failure to establish scientific reliability of hypnosis); Jones v. State, 542 P.2d 1316, 1326-27 (Okla. Crim. App. 1975) (expert witness not permitted to testify concerning defendant's exculpatory statements because hypnosis scientifically unreliable).

One court has stated "[i]t was well within the trial court's discretion to determine that the dubious value . . . [hypnotically-induced testimony] might have in clarifying and supporting defendant's theory of memory restoration would be outweighed by the chance of misinterpretation and misuse by the jury." People v. Hangsleben, 86 Mich. App. 718, 729, 273 N.W.2d 539, 544 (1978).

In 1961, the California Supreme Court came to a similar conclusion in People v. Busch, 56 Cal. 2d 868, 366 P.2d 314, 16 Cal. Rptr. 898 (1961). The supreme court found that an expert's opinion, based in part on a hypnotic examination, was not admissible when neither the reliability of hypnosis nor the qualifications of the witness were established by the record. *See id.* at 878, 366 P.2d at 319-20, 16 Cal. Rptr. at 903-04. The *Busch* case subsequently was construed by the California Supreme Court in People v. Modesto, 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963), *overruled in part on other grounds*, People v. Morse, 60 Cal. 2d 631, 388 P.2d 33, 35 Cal. Rptr. 201 (1964). The *Modesto* court ruled that *Busch* did not exclude evidence of a doctor's opinion based on hypnosis when the witness was qualified as an expert psychiatrist and noted that nothing in *Busch* prevented the introduction of all the data on which the doctor based her opinion. *See id.* at 733, 382 P.2d at 39-40, 31 Cal. Rptr. at 231-32. The court indicated that the lower court had erred by relying on *Busch* to exclude such evidence and failing to exercise its discretion in determining whether a recording of the hypnotic procedure should have been admitted. *See id.*

Recently, California went one step further and held that it was not improper to allow post-hypnotic testimony into evidence. *See* People v. Diggs, — Cal. App. 3d —, —, 169 Cal. Rptr. 386, 391 (1980). The court indicated that such evidence is admissible if the proponent establishes (1) the reliability of the technique, (2) that the witness furnishing the testimony has the proper qualifications as an expert to give an opinion on the subject, and (3) that in the instant case the correct scientific procedures were used. *Id.* at —, 169 Cal. Rptr. at 391.

25. *See, e.g.*, United States v. Adams, 581 F.2d 193, 198 (9th Cir.) (memory refreshed by hypnosis affects credibility not admissibility; care must be exercised to ensure memory is witness' own recollection), *cert. denied*, 439 U.S. 1006 (1978); United States v. Narciso, 446 F. Supp. 252, 281-82 (E.D. Mich. 1977) (court allowed witness to testify following hypnosis where testimony was corroborated by other evidence); People v. Smrekar, 68 Ill. App. 3d 379, 388, 385 N.E.2d 848, 855 (1979) (corroboration of facts adduced under hypnosis was one factor looked to in allowing previously hypnotized witness to testify); Harding v. State, 5 Md. App. 230, 247, 246 A.2d 302, 312 (1968) (victim's testimony refreshed by hypnosis held admissible on several grounds including corroborated facts), *cert. denied*, 395 U.S. 949 (1969).

26. *See* notes 27-30 *infra* and accompanying text.

27. 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978).

called upon to testify in court carries a dangerous potential for abuse."[28] The court indicated that "[g]reat care must be exercised to insure that statements after hypnosis are the product of the subject's own recollections, rather than of recall tainted by suggestions received while under hypnosis."[29] Several jurisdictions have established or recommended safeguards to prevent this abuse.[30]

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28. *See* 581 F.2d at 198. In this case, the defense objected to the prosecution's impeachment of a witness, who had been previously hypnotized, by the use of a statement made by the witness following hypnosis. *See id.*

29. *See id.* at 198-99 (footnotes omitted). Although the court did allow the post-hypnotic testimony with an attendant cautionary note, it expressed disapproval of the hypnosis methods used because it was not clear who was present, what questions were asked, and what the witness' responses were during the hypnotic session. *See id.* at 199 & n.12.

30. *See, e.g., id.* at 199 n.12; People v. Smrekar, 68 Ill. App. 3d 379, 388, 385 N.E.2d 848, 855 (1979); Harding v. State, 5 Md. App. 230, 247, 246 A.2d 302, 312 (1968), *cert. denied*, 395 U.S. 949 (1969); State v. McQueen, 295 N.C. 96, 122, 244 S.E.2d 414, 428 (1978); State v. Pierce, 263 S.C. 23, 30, 207 S.E.2d 414, 418 (1974); State v. White, No. J-3665 (Wis. 2d Cir. Ct. Mar. 27, 1979).

The court in *White* concluded that as a matter of law the hypnotic session was unduly suggestive and adopted the following safeguards or requirements, which were not met by the defendant in that case:

1. That the hypnotist be a mental health person with special training in the use of hypnosis, preferably a psychiatrist or psychologist;
2. that this person not be informed about the case verbally, but only in a writing that outlines the necessary facts and is subject to scrutiny;
3. that the hypnotist be independent and not responsible to the parties;
4. that all contact between the hypnotist and the subject be videotaped from the beginning to the end;
5. that nobody representing either party be present with the hypnotist and the subject during the hypnotic session;
6. that prior to the session the hypnotist examine the subject to exclude the possibility of physical or mental illness and to establish that the person has sufficient intelligence, judgment, and comprehension of what is happening;
7. that the hypnotist elicit all facts from the subject prior to the hypnosis;
8. that during the session, the hypnotist strive to avoid adding any new elements to the subject's recollection, including any explicit or implicit cues, before, during, or after the session;
9. that corroboration be sought for any information elicited during the session. *Id.*, slip op. at 11-12.

Another court has stated:

> We think that, at a minimum, complete stenographic records of interviews of hypnotized persons who later testify should be maintained. Only if the judge, jury, and the opponent know who was present, questions that were asked, and the witness's responses can the matter be dealt with effectively. An audio or video recording of the interview would be helpful.

United States v. Adams, 581 F.2d 193, 199 n.12 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978).

In an effort to prevent the potential abuse of hypnosis, the complainant in *Mack* proposed a two-prong test to negate the possibility of the hypnotized subject adopting "a 'memory' solely due to suggestion rather than due to recall." *See* Respondent's Brief at 39. The complainant felt the true question before the court was "what standard must be applied to find whether the hypnotically-elicited recall is derived from the witness' actual

Courts admitting hypnotically-induced testimony reject the assertion that testimony by a previously hypnotized person is inherently unreliable.[31] Instead, these jurisdictions hold that the use of hypnosis bears only on the credibility of the testimony.[32] The testimony, therefore, is admis-

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experience versus being the product of improper suggestion, deliberate falsehood, innocent confabulation or a desire to please the hypnotist." *See id.* at 38.

The first prong was based on the standard for suppresion set forth in Simmons v. United States, 390 U.S. 377 (1960). *See* Respondent's Brief at 39. In *Simmons*, the Court stated in regard to photographic identification that such evidence should be suppressed "only if the procedure was so impermissably suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *See* 390 U.S. at 384. The standard, when applied to a case involving hypnotically-induced testimony, is intended to resolve the problem of undue suggestion during hypnosis. *See* Respondent's Brief at 39. The complainant asserted that hypnotically-induced recall could be tested through cross-examination, the same as an ordinary recall may be tested through cross-examination, for the purpose of determining whether the *Simmons* standard should apply. *See id.* at 40.

The second prong proposed by the complainant was the independent corroboration of facts retrieved through hypnosis. *See id.* at 41-42. Under this test, the corroborated facts must have been unknown or unavailable to both the investigating authorities and the hypnotist prior to the hypnotic session. *See id.* Two of the experts in the case indicated that independent verification of the facts could provide a basis for concluding that the subject was "remembering." *See id.* at 43. The complainant asserted that "[b]ecause . . . [other jurisdictions allowing such testimony] paid considerable attention to factual corroboration, and because the five experts who testified herein paid considerable attention to corroboration, it appears to be a reasonable and feasible standard by which to guard against 'memories' that are without a basis in fact." *Id.* at 42.

The *Simmons* standard was adopted in another case involving circumstances very similar to the *Mack* case. *See* United States v. Narciso, 446 F. Supp. 252, 281-82 (E.D. Mich. 1977) (court applied *Simmons* standard to question of suggestibility during hypnotic session and subsequent interviews). The *Narciso* court recognized the possibility of misidentification through the use of hypnotic interrogation sessions but held that it did not rise to the level of a "very substantial likelihood of irreparable misidentification" that triggered exclusion of the evidence under *Simmons. See id.* at 281-82.

Other jurisdictions have adopted safeguards similar to the corroboration prong proposed by the complainant. *See, e.g.*, People v. Smrekar, 68 Ill. App. 3d 379, 388, 385 N.E.2d 848, 855 (1979) ("identification was corroborated by other substantial evidence unknown to the witness at the time she made the positive identification of the defendant"); Harding v. State, 5 Md. App. 230, 247, 246 A.2d 302, 312 (1968) ("there was sufficient corroboration of the [previously hypnotized] witness' testimony."), *cert. denied*, 395 U.S. 949 (1969); State v. McQueen, 295 N.C. 96, 122, 244 S.E.2d 414, 428 (1978) ("Corroborating circumstances developed through the testimony of other witnesses include the obvious falsity of the defendant's purported alibi testimony.").

31. *See, e.g.*, People v. Smrekar, 68 Ill. App. 3d 379, 385, 385 N.E.2d 848, 853 (1979); State v. Jorgensen, 8 Or. App. 1, 9, 492 P.2d 312, 315 (1971) (defendant's objections to hypnotically-induced testimony go to weight rather than admissibility of evidence).

In *Smrekar*, the court stated that

> when a [previously hypnotized] witness is capable of giving testimony having some probative value, the witness is permitted to testify with evidence of impairment of the ability of the witness to accurately recall evidence or that suggestive material has been used to refresh the witness' recollection going only to the weight to be given to the testimony of the witness . . . .

68 Ill. App. 3d at 385, 385 N.E.2d at 853 (citation omitted).

32. *See, e.g.*, State v. McQueen, 295 N.C. 96, 119, 244 S.E.2d 414, 427 (1978) (that

sible and the weight to be given to it is for the trier of fact to determine.[33]

Other jurisdictions hold that hypnotic evidence is inherently unreliable and, therefore, inadmissible.[34] The Illinois court, in *People v. Harper*,[35] declined to equate truth serum with hypnosis as memory retrieval devices, noting "that the scientific reliability of neither is sufficient to justify the use of test results of either in the serious business of criminal prosecution."[36] In *Greenfield v. Commonwealth*,[37] the Virginia Supreme Court refused to allow an expert to testify regarding the defendant's exculpatory statements, made while under hypnosis, on the ground that most experts would agree that hypnosis is unreliable.[38]

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witness was hypnotized bears upon credibility); State v. Jorgensen, 8 Or. App. 1, 9, 492 P.2d 312, 315 (1971) (that witness was hypnotized bears upon weight to be given testimony); note 43 *infra*. In *McQueen*, the court stated:

> The fact that the memory of a witness concerning events, distant in time, has been refreshed, prior to trial, as by the reading of documents or by conversation with another, does not render the witness incompetent to testify concerning his or her present recollection. The credibility of such testimony, in view of prior uncertainty on the part of the witness, is a matter for the jury's consideration. So it is when the witness has, in the meantime, undergone some psychiatric or other medical treatment by which memory is said to have been refreshed or restored. So it is when the intervening experience has been hypnosis.

Id. at 119, 244 S.E.2d at 427-28.

33. *See* People v. Smrekar, 68 Ill. App. 3d 379, 386, 385 N.E.2d 848, 853 (1979) (use of hypnosis to refresh witness' recollection goes "only to the weight to be given to the testimony of the witness"); Harding v. State, 5 Md. App. 230, 236, 246 A.2d 302, 306 (1968) (that witness received her present knowledge after being hypnotized concerns question of weight of evidence), *cert. denied*, 395 U.S. 949 (1969); State v. McQueen, 295 N.C. 96, 119, 244 S.E.2d 414, 427 (1978) (jury advised that witness was hypnotized; credibility of witness was for jury to determine). *But see* United States v. Awkard, 597 F.2d 667, 670-71 (9th Cir.) (held that court abused discretion by allowing expert to testify regarding effect of hypnosis on witness when use of hypnosis was not disputed), *cert. denied*, 444 U.S. 885 (1979); People v. Kester, 78 Ill. App. 3d 902, 909, 397 N.E.2d 888, 894 (1979) (held that testimony of expert concerning witness' statements while under hypnosis were inadmissible).

34. *See* State v. La Mountain, 125 Ariz. 547, 551, 611 P.2d 551, 555 (1980) (state of science of hypnosis has not been shown to be such so as to allow hypnotically-induced testimony); note 24 *supra*.

35. 111 Ill. App. 2d 204, 250 N.E.2d 5 (1969) (victim of sexual assault voluntarily submitted to hypnosis and treatment with sodium amobarbital in effort to recall assailant).

36. *See id.* at 209, 250 N.E.2d at 7. Although the victim underwent a hypnotic examination, it did not produce any information; the contested identification was made after use of the "truth serum." *See id.* at 206, 250 N.E.2d at 6.

37. 214 Va. 710, 204 S.E.2d 414 (1974).

38. *See id.* at 715, 204 S.E.2d at 419 ("Most experts agree that hypnotic evidence is unreliable because a person under hypnosis can manufacture or invent false statements.").

In a companion case involving the same defendant and arising out of the same fact situation as in Greenfield v. Commonwealth, 214 Va. 710, 204 S.E.2d 414 (1974), a federal district court also applied a reliability test. *See* Greenfield v. Robinson, 413 F. Supp. 1113 (W.D. Va. 1976). The *Robinson* case was a habeas corpus action brought by the defendant, Greenfield, after his conviction in state court was affirmed. The *Robinson* court ruled that the state court was correct in refusing to permit defendant to testify while in a hypnotic

The Minnesota court adopted a similar approach in *Mack*.[39] The court applied a standard of admissibility that addressed the reliability of hypnosis in reviving an accurate memory.[40] Competency, not credibility, was therefore the pivotal issue.[41] The standard applied by the *Mack* court was first articulated in *Frye v. United States*.[42] The *Frye* test requires a consensus within the scientific community regarding the reliability of the scientific device before it or its results are admissible.[43] The Minnesota Supreme Court first adopted the *Frye* standard to exclude the results of a polygraph test in *State v. Kolander*.[44]

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trance or to allow defendant's expert witness to testify about defendant's statements made while under hypnosis because there was "no reason to suggest that the excluded evidence . . . [was] reliable. Indeed the very reason for excluding hypnotic evidence is due to its potential unreliability." *Id.* at 1120 (citations omitted).

39. *See* notes 40-43 *infra* and accompanying text.

40. *See* 292 N.W.2d at 768.

41. *See id.* at 768-69 ("fact that a witness' memory results from hypnosis bears on the question of whether her testimony is sufficiently competent . . . to merit admission at all").

42. 293 F. 1013 (D.C. Cir. 1923).

Frye dealt with whether the results of a systolic blood pressure deception test, a forerunner of the modern day "polygraph," were admissible. Holding that the device had not gained sufficient standing and scientific recognition among the scientific community, the court established the following principle: "While courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field to which it belongs." *Id.* at 1014.

In *Mack*, defendant proposed the use of a *Frye*-type standard. *See* Petitioner's Brief at 9-11. The defendant proposed a three-pronged test to determine the admissibility of evidence based upon the application of a new scientific technique. *See id.* at 11. The test was as follows: first, the reliability of the method must be established; second, the witness must be properly qualified as an expert to give an opinion; and, third, the correct scientific procedures must have been used in the matter at hand. *See id.*

One jurisdiction has implicitly rejected the *Frye* test. In State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978), the defense argued that hypnosis was inadmissible based upon an earlier decision of the court that held lie detector tests inadmissible. *See id.* at 121, 244 S.E.2d at 429. The court rejected this argument stating:

> That is an entirely different question from the one with which we are here confronted. There, the purpose of the proposed evidence was to invade the province of the jury with evidence designed to show the credibility or lack of credibility of other testimony. This Court concluded that the accuracy of the results attained by the use of such scientific device had not been sufficiently established to justify its use for that purpose. Here, we are concerned with the admissibility of testimony which the witness says is her present recollection of events which she saw and heard, the credibility of her testimony being left for the jury's appraisal.

Id. at 121-22, 244 S.E.2d at 429.

43. *See* State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980). "Under the *Frye* rule, the results of mechanical or scientific testing are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate." *Id.*

44. *See* 236 Minn. 209, 220-21, 52 N.W.2d 458, 464 (1952). The court noted the value of a lie detector as an investigative tool but found that the lie detector "has not yet attained such scientific and psychological accuracy . . . to justify submission thereof to a

Applying the *Frye* standard, the *Mack* court concluded that testimony adduced while the individual was under hypnosis was not sufficiently reliable to meet this standard of admissibility.[45] Of particular concern to the court was the highly suggestive state into which a hypnotized person is induced and the likelihood that the testimony is, therefore, unreliable.[46] The court also was concerned that hypnosis may result in confab-

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jury as evidence of the guilt or innocence of a person accused of a crime." *Id.* at 221-22, 52 N.W.2d at 465.

Since *Kolander*, the Minnesota Supreme Court has continued to apply the *Frye* standard to polygraph tests as well as to other scientific devices or techniques. *See, e.g.*, State v. Wakefield, 263 N.W.2d 76, 77 (Minn. 1978) (polygraph inadmissible), *noted in* 6 WM. MITCHELL L. REV. 455 (1980); State v. Hill, 312 Minn. 514, 525, 253 N.W.2d 378, 385 (1977) (per curiam) (polygraph inadmissible); State v. Goblirsch, 309 Minn. 401, 407, 246 N.W.2d 12, 15 (1976) (polygraph inadmissible); State v. Gerdes, 291 Minn. 353, 359, 191 N.W.2d 428, 432 (1971) (results of radar in speeding cases may be admissible); State v. Quinn, 289 Minn. 184, 187, 182 N.W.2d 843, 845 (1971) (results of breathalizer test held admissible).

One jurisdiction has held that polygraph test results are admissible in limited circumstances in a criminal proceeding. *See* State v. Dorsey, 88 N.M. 184, 184-85, 539 P.2d 204, 204-05 (1975). In *Dorsey*, the court held that a polygraph's results were admissible under the following circumstances: 1) the test is stipulated to by both parties; 2) no objection to admissibility is offered at trial; 3) the polygraph operator is an expert; 4) there is testimony of authorities in the field on the reliability of the testing procedures; and 5) the validity of the tests made on the subject is established. *See id.*

45. *See* 292 N.W.2d at 768. The *Mack* court stated:

> Although hypnotically-adduced "memory" is not strictly analogous to the results of mechanical testing, we are persuaded that the *Frye* rule is equally applicable in this context, where the best expert testimony indicates that no expert can determine whether memory retrieved by hypnosis, or any part of that memory, is truth, falsehood, or confabulation—a filling of gaps with fantasy. Such results are not scientifically reliable as accurate.

Id.

For a general discussion of the experts' testimony in this case, see Petitioner's Brief at A-I-1 to -V-33 (contains excerpts of testimony of five experts in this case).

The case with a fact situation most similar to *Mack* is Harding v. State, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969), which involved a young woman who was the victim of a rape and assault but could not recall the identity of her assailant until she was put under hypnosis. The *Harding* court held that even though the victim-witness told different stories before and after the hypnosis, the discrepancy concerned a "question of the weight of the evidence which the trier of [fact] . . . must decide." *Id.* at 236, 246 A.2d at 306.

A criticism of the conclusion reached in *Harding* is that it "appears that the court may have fallen into the major trap to which the authorities call attention: the fact that because the victim appeared to be both *convincing* and *convinced* of the accuracy of her story, the court also became convinced." Dillof, *The Admissibility of Hypnotically Influenced Testimony*, 4 OHIO N.U.L. REV. 1, 20 (1977) (emphasis in original). By its ruling, the *Mack* court avoided the pitfall of being convinced of the hypnotically-induced testimony merely because the subject was convinced.

The court rejected as "artificial and unprincipled" any distinction between hypnotically-induced testimony offered by the defense to exculpate and that offered by the prosecution to prove its case. *See* 292 N.W.2d at 771.

46. *See* 292 N.W.2d at 768-69. The court also noted that "the historical or scientific accuracy of the memory adduced under hypnosis is not an ordinary subject of investiga-

ulation or deliberate fabrication because of the subject's desire to please the hypnotist.[47] The court further believed that a hypnotized subject is

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tion or concern by its practitioners in the medical and psychological community." *Id.* at 768.

47. *See id.* In *Mack*, the court observed:

> The hypnotized subject is influenced by a need to "fill gaps." When asked a question under hypnosis, rarely will he or she respond, "I don't know." Another factor . . . which can affect the "memory" produced under hypnosis is the subject's desire to please either the hypnotist or others who have asked the person hypnotized to remember and who have urged that it is important that he or she remember certain events.

Id.

There is some evidence to indicate that a hypnotized person is capable of being intentionally deceitful under hypnosis if sufficiently motivated. "The subject may feign induction into the hypnotic state, a truly hypnotized, cooperative subject may commingle fantasy with fact, and the truly hypnotized subject may deliberately dissemble where his interests dictate that such is the most propitious course of action." Spector & Foster, *supra* note 18, at 577.

One commentator has noted:

> Hypnosis has several dangers when it is used to find truth or to assist in refreshing the memory of a witness. There are pitfalls involving the hypnotized subject. A subject may lie, confabulate, suffer memory distortions or alterations in varying degrees or even fake being in a hypnotic trance. There are dangers associated with the hypnotist. The hypnotist may be predisposed toward a certain result; he may overtly or subconsciously coerce or influence the subject to give desired answers; he may ask the subject leading questions; or the techniques used by the hypnotist may simply be unreliable. In addition, the physical surroundings and conditions under which the hypnosis was performed may also influence the result.

Dilloff, *supra* note 45, at 4 (footnote omitted).

In the court's view the facts in *Mack* were suspect and may have been the primary reason for the expanded application of the *Frye* standard, which has traditionally been reserved for scientific devices. The court stated:

> The circumstances presented by the case before us are most suspect. Hypnosis of Ms. Erickson was not necessary to assist the prosecution in identifying the defendant, who was the only person in the motel room with her when she was injured. Beauford Kleidon, the hypnotist, has no formal education and no scientific understanding of the human memory or of the operation of suggestion in hypnosis. Furthermore, he was hired by the police, whose interest in the outcome of the hypnotic session might well have been communicated to Ms. Erickson. These interested parties, but no representative of the defendant, were, in fact, present at the hypnotic session, possibly cuing Ms. Erickson's memory by their facial expressions and gestures. The hypnotic session itself took place several weeks after the incident which Ms. Erickson sought to recall, during which time she undoubtedly spoke to the physicians who treated her and entertained their own hypotheses regarding the origins of the injury, as well as to the police and her friends.

292 N.W.2d at 772.

Even if the court adopted the two-prong test proposed by the complainant, see note 30 *supra*, it is unlikely that the second prong would have been met in the instant case. The *Mack* court indicated that the facts recalled by the complainant while under hypnosis were not corroborated. *See* 292 N.W.2d at 772 (complainant stated she ate pizza at Embers, which does not serve pizza; stated defendant's motorcycle was black when it was actually maroon; stated she had met defendant prior to incident but facts indicated otherwise).

prone to be absolutely convinced of the truth of what is recalled under hypnosis.[48] As a result, "[i]t would be impossible to cross-examine such a witness in any meaningful way."[49]

The scope of the *Frye* standard was significantly broadened by the *Mack* court's application of it to hypnotically-induced testimony.[50] Traditionally, this test has been applied to mechanical devices such as the polygraph, breathalyzer, and radar.[51] Hypnosis, however, is not a mechanical device that attempts to serve a truth-determinative function.[52] Rather, it is a method used to restore the memory of an event that has been forgotten or psychologically suppressed.[53] Neither hypnotically-induced memory nor ordinary memory produce a totally accurate recollection of a particular event observed by a witness.[54] Yet, despite the unreliability of ordinary memory, a witness is allowed to testify regarding an observed event, subject to the attendant safeguards of a court proceeding.[55] The use of hypnosis, therefore, should affect the credibility

48. *See* 292 N.W.2d at 769. "[A] 'memory' produced under hypnosis becomes hardened in the subject's mind. A witness [following hypnosis] becomes convinced of the absolute truth of the account he made while under hypnosis." *Id.*

49. *Id. See also* note 14 *supra*.

50. *See* notes 43-44 *supra*.

51. *See* note 44 *supra*.

52. *See* Spector & Foster, *supra* note 18, at 584. "Unfortunately, hypnosis has become linked in the minds of courts and commentators with the polygraph and narcoanalysis as a technique for mechanically ascertaining the truth of the witness' testimony." *Id.* (footnotes omitted).

The *Mack* court did indicate, however, that hypnosis was not strictly analogous to mechanical testimony. *See* 292 N.W.2d at 768.

53. *See* People v. Smrekar, 68 Ill. App. 3d 379, 385-86, 385 N.E.2d 848, 853 (1979) ("[H]ypnosis has become established as a valuable tool in the hands of the skilled practitioner and can be used to restore the memory of experiences which have been repressed due to their unpleasant or painful nature."); Spector & Foster, *supra* note 18, at 584 ("value of hypnosis lies in its scientifically-established reliability as a device for retrieving relevant testimony previously forgotten or psychologically suppressed").

54. *Compare* Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313, 314 (1980) (memory of witness who has been hypnotized is so contaminated that he is, in effect, rendered incompetent to testify) *with* Buckhout, *Eyewitness Testimony*, SCIENTIFIC AMERICAN, Dec. 1974, at 23 (research and courtroom experience indicate that witness is not capable of accurately recalling events previously witnessed), *reprinted in* 15 JURIMETRICS J. 171, 171 (1975) *and* Loftus, *Reconstructing Memory: The Incredible Eyewitness*, PSYCHOLOGY TODAY, Dec. 1974, at 117 (eyewitness testimony is often inaccurate and results in wrong person being convicted), *reprinted in* 15 JURIMETRICS J. 188, 189 (1975).

55. *See* Spector & Foster, *supra* note 18, at 584 (eyewitness testimony, although unreliable, "is routinely admitted for jurors' consideration because it is insulated to some degree . . . by the enforcement of procedural safeguards, such as opportunity for cross-examination").

Courts have traditionally been liberal regarding the manner in which a witness' memory may be refreshed. *See* Note, *Refreshing the Memory of a Witness Through Hypnosis*, 5 U.C.L.A.-ALASKA L. REV. 266, 267 (1976). The Minnesota court has allowed a variety of methods to be used to refresh a witness' memory. *See, e.g.*, Ostrowski v. Mockridge, 242

of the hypnotically-induced testimony and not its admissibility.[56]

Although the *Mack* court resolutely states that hypnotically-induced testimony is not admissible in a criminal proceeding, the court did not foreclose "the use of hypnosis as an extremely useful investigative tool when a witness is enabled to remember verifiable factual information which provides new leads to the solution of a crime."[57] The court did, however, recognize the potential for abuse inherent in the investigative use of hypnosis. The *Mack* court suggested that safeguards be established "to assure the utmost freedom from suggestion upon the hypnotized person's memory recall in the event he or she must later be called to testify to recollections recorded before the hypnotic interview."[58] In a footnote,

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Minn. 265, 273-74, 65 N.W.2d 185, 191 (1954) (memo prepared from payroll records of employer used to refresh memory); State v. Raasch, 201 Minn. 158, 161, 275 N.W. 620, 621 (1937) (use of transcript of recording permitted to help witness refresh memory of recording); Draxten v. Brown, 197 Minn. 511, 514, 267 N.W. 498, 499-500 (1936) (doctor permitted to refresh memory from nurses' notes).

This liberal attitude toward allowing the witness to refresh his memory is predicated on various safeguards that exist to prevent abuse or unreliable use of the memory refreshing device. *See* Note, *supra*, at 268-69.

One court has stated that any method that refreshes a memory should be allowed. *See* Jewett v. United States, 15 F.2d 955, 956 (9th Cir. 1926). The court stated:

> [I]t is quite immaterial by what means the memory is quickened; it may be a song, or a face, or a newspaper item, or a writing of some character. It is sufficient that by some mental operation, however mysterious, the memory is stimulated to recall the event, for when so set in motion it functions quite independently of the actuating cause.

Id; *accord*, United States v. Narciso, 446 F. Supp. 252, 281 (E.D. Mich. 1977) (allowing prosecution witness to testify to events in case as he recalled them under hypnosis). The court in *Narciso* indicated that "[t]he hypnosis enabled him to gradually begin to recapture fragments of his memory in a way that led him to believe—as a part of a necessary human personality defense mechanism—that he had never forgotten anything at all." *Id.* (footnote omitted).

56. *Cf.* Kline v. Ford Motor Co., 523 F.2d 1067, 1069-70 (9th Cir. 1975) (per curiam) (although memory of witness was refreshed by hypnosis for civil case, "in legal effect her situation is not different from that of a witness who claims that his recollection of an event that he could not earlier remember was revived when he thereafter read a particular document").

For a discussion of those courts that have held that the fact that a witness has been hypnotized affects the credibility and not the admissibility of this testimony in a criminal proceeding, see notes 32-33 *supra* and accompanying text.

The safeguards proposed by the complainant could be applied to determine the admissibility of hypnotically-induced testimony because they attempt to ensure first, that memory adduced under hypnosis is not the product of suggestion and second, that the recall is accurate and not confabulation. *See* Respondent's Brief at 39-45.

57. 292 N.W. at 771. "A witness under hypnosis may, for instance, bring forth information previously unknown to law enforcement authorities . . . which subsequently aids police in identification of a suspect." *Id.*

The Arizona court, although refusing to admit hypnotically-induced testimony also deemed hypnosis to be a useful investigative tool. *See* State v. La Mountain, 125 Ariz. 547, 551, 611 P.2d 551, 555 (1980).

58. 292 N.W.2d at 771 (footnote omitted).

the court noted but did not adopt these safeguards:[59] 1) hypnosis should be performed by a trained psychiatrist or psychologist who has no previous knowledge of the investigation or any bias in the case; 2) all contact between the hypnotist and the subject should be video-taped; 3) no one but the hypnotist and the subject should be present before and during the hypnotic session; and 4) tape recordings should be made of any interrogations of the witness prior to the hypnotic session.[60]

By noting, but not adopting these safeguards, the *Mack* court failed to answer the crucial question of what standards investigative agencies and attorneys must adhere to when using hypnosis as an investigative de-

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59. *See id.* at n.14. The safeguards were proposed by Dr. Orne, one of the experts in the case. *See id.* Dr. Orne, who is a licensed psychiatrist and a chemical psychologist, heads the major hypnosis research laboratory in the country, where he conducts research experiments on hypnosis. *See* Respondent's Brief at 15-16 n.1. "He has served as a consultant to a variety of governmental agencies on the subject of hypnosis, and has testified widely on the subject. His publications in the area of hypnosis are numerous." *Id.*

60. *See id.* at 771-72 n.14. The safeguards suggested were:

> A. Hypnosis should be carried out by a psychiatrist or psychologist with special training in its use. He should not be informed about the facts of the case verbally; rather, he should receive a written memorandum outlining whatever facts he is to know, carefully avoiding any other communications which might affect his opinion. Thus, his beliefs and possible bias can be evaluated. It is extremely undesirable to have the individual conducting the hypnotic sessions to have any involvement in the investigation of the case. Further he should be an independent professional not responsible to the prosecution or the investigators.
>
> B. All contact of the psychiatrist with the individual to be hypnotized should be video taped from the moment they meet until the entire interaction is completed. The casual comments which are passed before or after hypnosis are every bit as important to get on tape as the hypnotic session itself. (It is possible to give suggestions prior to the induction of hypnosis which will act as post-hypnotic suggestions.)
>
> Prior to the induction of hypnosis, a brief evaluation of the patient should be carried out and the psychiatrist should then elicit a detailed description of the facts as the witness or victim remembers them. This is important because individuals often are able to recall a good deal more while talking to a psychiatrist than when they are with an investigator, and it is important to have a record of what the witness's beliefs are before hypnosis. Only after this has been completed should the hypnotic session be initiated. The psychiatrist should strive to avoid adding any new elements to the witness's description of his experiences, including those which he had discussed in his wake state, lest he inadvertently alter the nature of the witness's memories—or constrain them by reminding him of his waking memories.
>
> C. No [one] other than the psychiatrist and the individual to be hypnotized should be present in the room before and during the hypnotic session. This is important because it is all too easy for observers to inadvertently communicate to the subject what they expect, what they are startled by, or what they are disappointed by. If either the prosecution or the defense wish to observe the hypnotic session, they may do so without jeopardizing the integrity of the session through a one-way screen or on a television monitor.
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> D. Because the interactions which have preceded the hypnotic session may well have a profound effect on the sessions themselves, tape recordings of prior interrogations are important to document that a witness had not been implicitly or explicitly cued pertaining to certain information which might then be reported for apparently the first time by the witness during hypnosis.

Id.

vice.[61] The practical use of hypnosis as an investigatory device is, therefore, uncertain. If the use of hypnosis is permissible for investigative purposes, and memory adduced from the hypnotic session leads to verifiable factual information that is admissible, then that acquired memory should be admissible because its reliability is established.[62] It is important that all material facts concerning a particular incident are before the trier of fact. Although there certainly will be situations in which it will be difficult to separate independently corroborated facts from the witness' memory following hypnosis,[63] this does not justify a blanket prohibition on the use of hypnotically-induced testimony in a criminal proceeding.

The decision in *Mack* presupposes the scientific unreliability of hypnosis. This presupposition is based on medical testimony that points out the difficulty in separating fact from fiction in a "memory" restored by hypnosis. The Minnesota Supreme Court's application of the *Frye* scientific reliability test indicates that hypnosis may, in the future, achieve the requisite legal credibility. If hypnosis attains general acceptance in the

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61. An additional question left unanswered by the court is whether hypnotically-induced testimony is admissible in a civil proceeding.

One jurisdiction has held that hypnotically-induced testimony is admissible in a civil proceeding. *See, e.g.*, Kline v. Ford Motor Co., 523 F.2d 1067, 1069-70 (9th Cir. 1975) (per curiam); Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509-10 (9th Cir. 1974).

These decisions have held such testimony admissible as present recollection refreshed. The *Mack* court, however, rejected this premise, at least in the setting of a criminal prosecution. *See* 292 N.W.2d at 768-70. Therefore this question will have to be answered in a future decision.

62. Corroboration is one of the tests used by some of the courts that have admitted hypnotically-induced testimony. *See* note 25 *supra* and accompanying text.

If the hypnotic recall is corroborated by facts unknown prior to the hypnotic session, that would appear to be a strong indication that the particular procedure was reliable and would alleviate one of the *Mack* court's concerns regarding the use of hypnosis.

Additionally, there may be a constitutional problem in denying the admission of hypnotically-induced testimony. In Chambers v. Mississippi, 410 U.S. 284 (1973), the Supreme Court found that the defendant's right to due process had been violated when he was prevented from calling as a witness, a person who had heard the confession of another man for the crime for which the defendant was on trial. *See* 410 U.S. at 302.

One commentator perceived the *Chambers* decision as suggesting that:

> When a criminal defendant possesses reliable information that is crucial to his case, due process may require that he be given the right to present this testimony, despite a contrary rule of evidence. It is not difficult to see that there could be situations where either the defendant or a crucial defense witness is suffering amnesia regarding the events leading up to the crime. If hypnosis helps to remove the block, the defendant or the witness may remember things crucial to the defense. . . . Hypnosis may enable the defendant to recreate the event and in the process provide information leading to his acquittal and the possible arrest of the actual perpetrator.

Spector & Foster, *supra* note 18, at 610-11.

63. *See* Emmett v. State, 232 Ga. 110, 115, 205 S.E.2d 231, 235 (1974). Referring to a previously hypnotized witness, the court indicated that "[s]he was cross examined extensively and thoroughly. It does not appear which details she may have remembered after her hypnotic sessions." *Id.*

medical community as a reliable memory-refreshing device, the *Frye* standard may be met, signifying that hypnotically-induced testimony will be held admissible in Minnesota.